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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Cable Act Reform	)	CS Docket No. 96-85
Provisions of the Telecommunications Act	)	
of 1996	)	

OPPOSITION OF
THE NATIONAL CABLE TELEVISION ASSOCIATION

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The National Cable Television Association ("NCTA"), by its attorneys, hereby submits its Opposition to the Petition for Clarification and Reconsideration filed by the National Association of Telecommunications Officers and Advisors; National Association of Counties; United States Conference of Mayors and Montgomery County, Maryland (hereinafter "NATOA Petition") and the Petition for Reconsideration filed by the Wireless Communications Association International, Inc. (hereinafter "WCA Petition"). The rules which are the subject of Petitioners' reconsideration petitions were adopted by the Commission in a rulemaking proceeding implementing the Cable Act Reform provisions of the Telecommunications Act of 1996 ("1996 Act") which amended the Communications Act of 1934. NCTA actively participated in that rulemaking proceeding.

NATOA's Petition is directed principally at the Commission's implementation of Congress' restriction on the role of local franchising authorities in mandating cable system technical design. The WCA Petition objects to the Commission's rules regarding the 1996 Act's exemption of cable operators from the uniform rate requirement where an operator serves multiple dwelling units ("MDUs"). The Commission should deny both of these Petitions.

ARGUMENT

I. CONGRESS BROADLY PROHIBITED LFA INVOLVEMENT IN CABLE "TRANSMISSION TECHNOLOGY."

Congress in 1996 amended the Communications Act "to provide for a pro-competitive, de-regulatory national policy framework...."[1] Consistent with this overarching goal, in amending Section 624 of the Communications Act, Congress broadly proscribed local franchising authority ("LFA") involvement in the technical aspects of cable television system design or performance. It provided that "no State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology."[2] Congress at the same time stripped local franchising authorities of their ability to apply to the FCC for a waiver to adopt technical standards more stringent than the FCC's standards, or to enforce the FCC's technical standards.[3]

In comments filed in the rulemaking proceeding, NATOA and others advanced an unsupportable reading of Congress's intent in amending the Communications Act. They claimed then, as they claim now, that the 1996 amendment has no effect on their ability to require highly specific elements of cable system design. They contended then, as they contend now, that the sweeping statutory language restricts only their ability to require operators to use certain scrambling technology.[4]

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1 H.R. Rep. No. 104-458, 104th Cong. 2d Sess. 1 (1996).

2 47 U.S.C. Sec. 544(e).

3 Section 301(e) of the 1996 Act amendments struck the last two sentences of Section 624(e), which previously had permitted LFAs to include franchise provisions for the enforcement of technical standards and to apply to the FCC for a waiver to impose technical standards more stringent than the FCC's rules.

4 See Report and Order, CS Docket No. 96-85 (rel. Mar. 29, 1999) (hereinafter "Report and Order") at ¶138 (describing NATOA's argument that Section 624(e) "is intended to preclude LFAs from adopting and enforcing their own standards regarding subscriber equipment such as converter boxes, and transmission technology, such as the scrambling or trapping methods used to secure an operator's signals. They state that the amendment was a response to efforts by local authorities to restrict the use of converter boxes introduced by Time Warner in

The Commission had sound reasons to reject this unduly narrow reading the first time it considered it in the course of its rulemaking proceeding. NATOA's Petition presents no persuasive reason for revisiting that determination.

A. Section 624(e) Cannot Be Fairly Read to Apply Solely to a Prohibition on Scrambling.

In determining the areas which Congress intended to keep off-limits to local franchising authorities, the FCC acknowledged that "transmission technology" is not defined in the Act.[5] But it rejected the contention of NATOA and others that "transmission technology" should be interpreted to be as solely restricted to scrambling technology. Instead, it relied on "everyday usage" of the term to conclude that it has been used to include "both the transmission medium, i.e., microwave, satellite, coaxial cable, twisted pair copper telephone lines, and fiber optic systems, and the specific modulation or communications format, i.e., analog or digital communications."[6] The Commission held that LFAs, at a minimum, "may not control whether a cable operator uses digital or analog transmissions nor determine whether its transmission plant is composed of coaxial cable, fiber optic cable or microwave radio facilities."[7]

NATOA contends that the Commission adopted an unduly broad reading of the statute. NATOA's principal argument in support of its contrary construction of Section 624(e) is that "it is clear from the existing statutory framework and events occurring in the cable industry at the time that Congress amended Section 624 that Congress was concerned about a specific, and very

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several New England communities, and therefore that the terms 'subscriber equipment' and 'transmission technology' should be interpreted narrowly.")

5 Report and Order at ¶141.

6 Id.

7 Id.

limited problem: signal scrambling. Congress did not intend the term 'transmission technology' to be broadly construed."[8]

NATOA's reading of the Act is fundamentally flawed on several accounts. First, the plain language of the statute is not limited to "scrambling technology." Rather, the amendment to Section 624 broadly proscribes LFA activity, by eliminating an LFA's ability both to enforce technical standards and to "prohibit, condition or restrict" a cable system's use of "*any* type of subscriber equipment or *any* transmission technology."[9] Scrambling technology certainly is subsumed within "any transmission technology." But nothing in the language of the Act suggests that it is the *only* transmission technology off-limits to LFA restrictions or conditions.

Second, the legislative history of this section confirms that Congress meant its amendment to be broad in effect. It is legislative history that NATOA's Petition conveniently chooses to ignore. Congress intended to "avoid the effects of disjointed local regulation" and to eliminate the "patchwork of regulations that would result from a locality-by-locality approach...." This type of regulation, according to Congress, was "particularly inappropriate in today's intensely dynamic technological environment."[10]

This expression of congressional intent in no way suggests that a locality's interference with an operator's choice of scrambling technologies was Congress' sole concern. Indeed, one searches NATOA's Petition in vain for reference to any legislative history that even remotely supports its narrow construction of Section 624(e). Rather than legislative history, it cites to two trade press articles and the FCC's decision denying a New Hampshire effort to regulate

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[8] NATOA Petition at 8.

[9] Section 624(e) (emphasis supplied).

[10] H.R. Rep. No. 204(1), 104th Cong., 1st Sess. 110 (1995).

scrambling.[11] This hardly supports NATOA's contention that this provision should be read narrowly.

Third, a review of the statute as a whole further confirms that this section cannot be read to be limited to scrambling technology. Congress in this Act knew how to tackle scrambling issues when it meant to; indeed, it adopted three separate sections specifically dealing with scrambling concerns. When it did so, it did it directly – in completely different language than the broader language contained in Section 624(e).

For example, in Section 624A, Congress specifically mentioned "scrambling and encryption," providing "that the Commission shall not limit the use of *scrambling or encryption technology* where the use of such technology does not interfere with the functions of subscribers' television receivers or video cassette recorders."[12] Furthermore, when Congress amended the Act in 1996 to add Section 624(e), it included two other provisions, found in Sections 640 and 641 of the Act, directed specifically toward scrambling.[13] Under applicable principles of statutory construction, Congress' explicit reference to the terms "scrambling or encryption" technology in one section of the Act, and its use of "transmission technology" in another section, demonstrates that Congress intended the phrases to have different meanings.[14]

In sum, NATOA's claim that the language of Section 624(e) is narrowly limited to scrambling is baseless. It is belied by the plain language of the section, its legislative history, and general principles of statutory interpretation. The Commission's decision to reject NATOA's flawed statutory construction was entirely reasonable.

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[11] NATOA Petition at 9 n.19.

[12] 47 U.S.C. §624A(b)(2) (emphasis supplied).

[13] 47 U.S.C. Sec. 560, 561.

[14] See 2A Sutherland Statutory Construction §47.07 ("[w]here the legislature has chosen to define two terms in a statute differently, they cannot be used interchangeably.")

B. The Commission Thoroughly Considered the Interplay Between Section 624(e) and other LFA Responsibilities.

NATOA also alleges that the Commission's interpretation of Section 624(e) conflicts with other parts of the Act. In particular, NATOA points to Section 624(b)(1), which grants LFAs authority to establish cable system facilities and equipment requirements in a request for renewal proposal,[15] and Section 626 (b)(2), which permits LFAs to enforce any facilities and equipment requirement in a franchise.

NATOA asserts that the Commission's interpretation would impair an LFA's ability to exercise its power under these provisions. It claims that "it is hard to imagine how [the franchise granting and renewal] process could proceed to conclusion if an operator cannot be required to describe the system that it plans to build, and then to build the system that it promises to construct."[16] But the Commission can hardly be accused of ignoring this statutory framework. Its Order expressly took note of these provisions and recognized that local franchising authorities still have a role to play, albeit a more limited one than they might have played prior to Congress adopting Section 624(e). Indeed, paragraph 142 of the Order contains a significant list of LFA activities still deemed permissible by the Commission, including enforcement of requirements for facilities and equipment that do not constitute subscriber equipment or transmission technologies.

NATOA also opines that the public interest would be better served if its members could design cable systems. Its Petition alleges that "the Nation, as well as local communities, is well served by the system that allows LFAs to negotiate with cable operators over the specific, most

[15] NATOA Petition at 10 (citing Sections 624(b)(1) and 626(b)(2)).

[16] Id. at 11.

cost effective design of a system that can bring advanced cable services to communities."[17] But the Telecommunications Act of 1996 embraced a different notion of the public interest – one that envisioned "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans by opening all telecommunications markets to competition."[18] And Congress amended Section 624 based on a vision of the optimal way to serve the public interest diametrically opposed to that expressed by NATOA – one that eliminated a balkanized approach to cable system design and technical operations given the dynamic nature of the communications marketplace. Congress gave operators the ability to upgrade their systems unfettered by a local authority's technology micromanagement.

At bottom, NATOA's complaint is with the statute, not with the FCC's rules. It would have the FCC rewrite its rules to undo what Congress had done. But Congress intended to leave technology and design judgments to operators whose business is providing service to their customers. And Congress intended to evict LFAs from involvement in those judgments – leaving intact other responsibilities for facilities and equipment that do not entail the technical aspects of cable system design and operation.

II. NEGOTIATED FRANCHISE AGREEMENTS ARE NOT IMMUNE FROM THE ACT.

NATOA also urges the Commission to "clarify" that existing franchising agreements that contain terms flatly prohibited under Section 624(e) are not preempted.[19] But rather than

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[17] NATOA Petition at 13.

[18] H.R. Rep. No. 104-458, 104th Cong. 2d Sess. 1 (1996).

[19] Id. at 16.

"clarifying" the Order, adopting NATOA's reading would rewrite the Order in a manner not sustainable under the Act. The Commission should reject it.

The Commission understood that during the three years prior to its issuance of the Order, franchises had been renewed or negotiated that may have contained terms that would not be permissible under its rules or the 1996 Act amendment. The FCC did *not* grandfather those arrangements. Instead it stated that nothing in its order "is intended *automatically* to preempt or affect the enforceability of existing franchise agreements." [20] Thus, terms that conflict with the Act clearly are not grandfathered and are subject to challenge.

Nor could the Commission grandfather those terms. Section 624(e) does not limit its effect to franchises granted or renewed after the FCC rules became effective. In fact, the 1996 amendment to the Act was self-effectuating; Congress evidenced no intent to hold up the impact of its amendment pending FCC implementation of its rules. Three years did transpire prior to the Commission's adoption of rules, but that provides no reason to uphold provisions unlawful under the 1996 statute.

NATOA advances the equally spurious claim that "there is nothing in Section 624(e) of the Cable Act, nor in the Commission's own rules that would suggest that LFAs may not *negotiate* technical standards and requirements."[21] Indeed, NATOA claims that Section 624(e)'s effect is limited only to requirements unilaterally imposed by the LFA through an ordinance. Under its interpretation, voluntarily negotiated standards or requirements imposed by formal renewal would escape the Act's prohibition altogether.[22]

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[20] Report and Order at ¶143 (emphasis added).

[21] NATOA Petition at 18 (emphasis in original).

[22] Id.

That reading of the statute is surely incorrect. It eviscerates the amendment's intent. Indeed, under Section 624(a), LFAs are barred from regulating services, equipment or facilities "except to the extent *consistent with* this title."[23] Permitting LFAs to request or enforce any agreement regarding technical standards would be wholly *inconsistent* with Section 624 -- which eliminates any role for LFAs in prohibiting, conditioning or restricting an operator's use of any transmission technology or technical standards.

NATOA's reliance on Section 611 as support for its argument is similarly unavailing. Unlike Section 611, Congress in 1996 amended Section 624 to strip LFAs of their technical standards enforcement authority.[24] In doing so, Congress evidenced no intent to grant LFAs residual authority to enforce other technical aspects of cable system operations. Thus, LFAs have no authority to enforce agreements to provide any type of subscriber equipment or transmission technology, regardless of whether imposed by an ordinance or achieved through negotiations or renewal proceedings.

III. THE COMMISSION SHOULD NOT RECONSIDER ITS RATE RULES.

NATOA briefly mentions three other aspects of the Order that it finds objectionable. Two of those points merit a brief reply.[25] None of its complaints warrants changing the rules.

First, NATOA launches an attack on the FCC's small operator rate rules. Acknowledging that "attempts to limit unnecessary paperwork and filings to the FCC by small operators may make a certain deal of economic and regulatory sense," NATOA nevertheless

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[23] 47 U.S.C. §544 (a).

[24] That language had permitted LFAs to include provisions in a franchise for enforcement of technical standards.

[25] NATOA's third complaint is based on its claim that the Commission will permit potential service to be considered in determining whether a LEC "offers" comparable service to a franchise area under the 1996's Act new LEC effective competition test. While NCTA believes the Commission fundamentally misinterpreted the meaning of "offer" for purpose of the LEC effective competition test, Congress never required as part of that test that the Commission ignore potential LEC competition. NATOA thus sets up a false dichotomy.

argues that "eliminating the ability of the LFA to require the information it needs in order to determine what is actually going on is counterproductive to the goal of reasonably expanding rural and small markets and to ensuring that these markets have reasonably priced service reasonably equivalent to major market service."[26]

It is not at all clear what information NATOA claims is necessary and for what purpose. But to the extent that NATOA is urging that small operators still should be required to file rate justifications with their LFA, that route is simply forbidden by the 1996 Act amendments. Small operators that qualify for basic tier rate deregulation are not obligated to justify rates to local governments. Requiring them to do so would amount to unnecessary paperwork and would impose additional, unjustifiable cost, defeating Congress's intent in freeing small operators from regulatory burdens. To the extent a LFA has legitimate needs for information to determine whether a system qualifies for small system deregulation in the first instance, the Commission has adopted procedures to ensure that LFAs obtain all relevant information without burdening small cable operators.[27]

Second, NATOA attacks the FCC's uniform rate rules and procedures, faulting the FCC for "inappropriately plac[ing] the initial burden of showing that a discounted price is predatory on LFAs."[28] First of all, while the Act does not condone predatory conduct, it is not clear that LFAs were the intended beneficiaries of this provision. In fact, NATOA's Petition does not explain why its members would be concerned about low rates that are not obviously predatory. In any event, placing the initial burden on a complainant is precisely what the Act commands. Section 623(d) as amended by the 1996 Act provides that "*upon a prima facie showing by a*

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[26] NATOA Petition at 21.

[27] See Report and Order at ¶81.

[28] NATOA Petition at 21.

complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory." [29] In the face of this unambiguous statutory language, NATOA's assertion has no merit.

IV. WCA'S INTERPRETATION OF "BULK DISCOUNT" IS NOT SUPPORTED BY THE ACT.

Section 623(d) of the Act generally requires that cable systems not subject to effective competition have uniform rate structures throughout their service areas.[30] In the 1996 Act, however, Congress exempted "bulk discounts to multiple dwelling units" from this requirement, "except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit."[31]

A. The Commission Correctly Construed "Bulk Discounts" to Permit Operators to Bill MDU Customers Separately.

In implementing this provision, the Commission concluded that a "bulk discount," for purposes of this exemption, is any "volume discount, available to all residents of the MDU."[32] WCA argues that this is an impermissible interpretation of the law. In its view, the exemption should apply only to "a bulk sale *paid for directly by the owner or manager of the MDU property*, and not to discounted rates offered and billed separately to each tenant."[33] WCA is wrong because they misinterpret the meaning of "bulk" and ignore that the statute deals with "bulk discounts."

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[29] Section 623(d).

[30] 47 U.S.C. §543(d).

[31] The exception to the uniform rate requirement was added by Section 301(b)(2) of the 1996 Act.

[32] Report and Order, ¶100.

[33] WCA Petition at 2 (emphasis added).

If there is a public policy justification – or, indeed, any rational basis – for WCA's reading of this provision, it is not to be found in WCA's petition. As the Commission pointed out,

> [t]he House Commerce Committee proposed the statutory change because the Commission's former regulations did "not serve consumers well by effectively prohibiting cable operators from offering *lower* prices in an MDU even where there is another distributor offering the same video programming in that MDU...." Allowing cable operators to respond to competition in individual MDUs gives consumers the benefit of lower prices from incumbent cable operators.[34]

The Commission saw "no statutory or policy reason" why the availability of this benefit to MDU residents should depend upon the particular billing arrangement used by cable operators.[35]

Moreover, the Commission was concerned "that mandating negotiations would make the MDU owner or manager the gatekeeper of competition, potentially regulating the operator's discounts and affecting the operator's ability to respond to competition." It was also "concerned that a requirement of negotiated discounts applicable only to cable operators may limit the cable operator's ability to respond to competition." Finally, "[t]o the extent that billing arrangements affect access to buildings . . . or have other competitive impact," the Commission wanted to ensure that its rules would not "create any competitive advantage or disadvantage or restrict consumer choice in services or service providers by imposing rules regarding the billing arrangements used by cable operators."[36]

WCA – whose members would, of course, like to limit the ability of cable operators to respond, even in a non-predatory manner, to MDU competition – offers no rebuttal to these

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[34] Report and Order, ¶96 (*quoting* House Report at 109 (emphasis in original)).

[35] Id. at ¶102.

[36] Id.

sensible public policy determinations. It simply argues that, apart from whether there is any *reason* for allowing the exemption only where the cable operator deals with and bills the MDU owner and not the residents, the statute requires such a limitation. There is no substance to this argument.

WCA concedes that "the term 'bulk' is not specifically defined in Section 301(b)(2) of the 1996 Act or anywhere else in the Communications Act of 1934, as amended."[37] This means, of course, that the Commission has substantial discretion to construe the term in a manner that is reasonable in light of the statutory purpose and context and is not inconsistent with its plain meaning.[38] But WCA contends that the meaning of "bulk" is plain – and that "bulk" discounts clearly are different from "volume" discounts.

WCA relies on Black's Law Dictionary, which defines "bulk sale" as the "sale of substantially all the inventory of a trade or business to one person in one transaction."[39] Even if the definition cited by WCA were the *only* common meaning of the term "bulk sale," that would prove nothing about the commonly understood meaning of "bulk *discount*" – which is, after all, the relevant statutory term.

Actually, dictionaries identify "volume" as a *synonym* of the term "bulk."[40] Indeed, the American Heritage Dictionary *defines* "bulk" as "great size, mass, or *volume*." If "bulk" *means* "volume," it is hard to see how the Commission's decision to treat all volume discounts as bulk discounts can violate the plain meaning of the statute.

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[37] WCA Petition at 6.

[38] Chevron USA v. NRDC, 467 U.S. 837 (1984).

[39] See Petition at 7.

[40] See, e.g., *Webster's New Collegiate Dictionary, American Heritage Dictionary of the English Language.* See also *Roget's Thesaurus.*

WCA also contends that, in other contexts, the Commission has recognized "that bulk rate customers are entirely separate and distinct from 'individual households' in a multiple dwelling unit, and that a landlord who pays a 'bulk rate' on behalf of his or her tenants is entirely separate and distinct from a tenant who purchases service individually and pays the basic subscriber rate."[41] But, in none of the examples cited by WCA has the Commission required a single bill to a landlord in order to qualify as a "bulk discount."

For example, in its methodology for calculating annual regulatory fees cited by WCA, the Commission distinguishes between "individual households in multiple dwelling unit (apartments, condominiums, mobile home parks, etc.) *paying at the basic subscriber rate*" and "bulk rate customers." Again, regardless of the definition of "bulk rate," the relevant statutory term is "bulk discount." WCA fails to explain how the FCC's methodology for calculating MDU customers paying at the bulk rate for purposes of assessing FCC per subscriber regulatory fees has any bearing on the meaning of a "bulk *discount*."

WCA notes that in *Falcon Cable Systems,* the Cable Services Bureau held that "[b]ecause Falcon has an actual count of its total subscribers, *bulk and residential,* it fails to meet the threshold requirement and is precluded from using the [equivalent billing unit] methodology."[42] In that case, the Commission was distinguishing between bulk subscribers who pay a discounted rate and "regular residential subscribers" who pay "the *standard* residential rate."[43] Although all the discounted rates in that case were, in fact, negotiated with MDU owners, nothing in the case suggests that individual MDU subscribers billed the discounted rates would not be deemed

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[41] WCA Petition at 8.

[42] Id. at 6, citing 13 FCC Rcd 4425, 4439 (CSB, 1998) (emphasis added by WCA).

[43] Id. at 4438.

"bulk" subscribers – much less that the discounts offered such subscribers would not be called "bulk discounts."

WCA's citation of the Bureau's statement in *SBC Media Ventures, Inc.*, that "[b]ulk basic rates are discounted service rates offered to multiple dwelling units, such as apartment buildings and condominiums"[44] is similarly misplaced. That case simply does not address whether the rates are billed to the building owner or to the individual resident in a MDU.

WCA points out that before Congress enacted the MDU bulk discount exemption, the Commission's rules permitted operators to offer bulk discounts to MDUs, provided that such discounts were *cost-justified* and uniform among buildings of the same size and type. And, as the Commission recognizes, those bulk discounts were "justified in the past by the efficiencies of rendering one invoice and achieving 100 percent penetration."[45] But the Commission noted that the new *statutory* exemption was enacted "to permit competitive responses *as well as* to reflect efficiencies in serving subscribers concentrated in an MDU."[46] To achieve this broader objective, it made the most sense to define "bulk discounts" to include all discounted rates for service to MDU subscribers, regardless how they are negotiated, offered, or billed.

WCA claims that in its 1996 Act amendment to Section 623(d) "Congress codified the Commission's then-existing bulk discount exception and applied it to 'bulk' discounts, not 'volume' discounts."[47] But Congress's 1996 action can hardly be viewed as an endorsement of the Commission's prior uniform rate regulations. Rather, Congress repudiated the prior FCC rule regarding permissible MDU rates and thereby removed any obligation to cost-justify

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[44] Id., citing 9 FCC Rcd 7175, 718 n.46 (CSB 1994).

[45] Report and Order, ¶102.

[46] Id. (emphasis supplied.)

[47] WCA Petition at 6.

differences in discounted rates between like buildings (so long as that rate is not predatory). Under these circumstances, the Act cannot fairly be read to have codified any prior FCC precedent in that respect. And given the pro-competitive intent of this section, the Commission's reasons for not adopting that type of restriction make perfect sense.

In sum, the Commission has followed the right path in construing the statute with respect to "bulk discounts." Recognizing that the term was not defined in the Act and had no unambiguously plain meaning, it sought to construe the term in the manner most consistent with the legislative purposes of the "bulk discount" exemption. And, in so doing, it carefully explained why, in this particular context, the term should be construed broadly.

B. The Commission Did Not Err in Interpreting MDUs to Encompass More Than a Single Building.

WCA is similarly mistaken in its narrow interpretation of "multiple dwelling units." WCA claims that "both Congress and the Commission historically have defined a 'multiple dwelling unit' as being a single building that contains multiple residences."[48] But even a review of the citations offered by WCA in support of that assertion demonstrate that an MDU has never been construed that narrowly.

For example, as far back as 1977, the Commission acknowledged that multiple buildings – including garden apartments, garden condominium apartment complexes, garden apartment communities, townhouse duplex condominium communities, and "other similar situations" -- could qualify as MDUs so long as "the elements of common ownership, control or management are involved."[49] And, since 1993, the Commission has interpreted the uniform rate structure rule to permit cable operators to establish reasonable categories of subscribers, including not only

[48] WCA Petition at 8-9.

those residing in a single apartment building but also "hotels, condominium associations, hospitals, universities, and trailer parks."[50]

The Act contains no definition of an MDU. And it suggests no intent on the part of Congress to limit cable competition to a single building containing multiple residences. What it does show is that Congress intended to loosen regulatory restraints on cable operators so that customers could benefit from lower rates. Under these circumstances, a broad interpretation of an MDU is entirely reasonable.

C. The Commission Can Only Address Predatory Pricing Claims Where an Operator Does Not Face Effective Competition.

The current FCC rule provides that "bulk discounts to multiple dwelling units" are not subject to the uniform rate requirement, "except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit."[51] This language is identical to the 1996 amendment to Section 623(d).

WCA, however, again attempts to urge the Commission to rewrite the statute to delete the reference to effective competition. In so doing, its revised language would subject *all* cable operators, even those subject to effective competition and hence not subject to rate regulation, to a claim of predatory pricing at the FCC.[52] The Commission should deny this WCA request.

The plain language of the statute only applies to cable systems that do *not* face effective competition. In those cases, competitors making out a prima facie showing may seek redress at

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[49] Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems, 63 FCC 2d 956, 997 (1977).

[50] Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd. 5631, 5897 (1993).

[51] 47 C.F.R. §76.984 (c)(3).

[52] WCA Petition at 10.

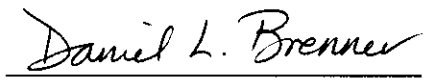
the FCC. This avenue of relief is not available to competitors in cases where operators do face effective competition – in those cases competitors are limited to traditional antitrust forums.

WCA's citation to the legislative history does not show otherwise. Rather, it says only that Congress did not intend "to supersede the Sherman Act by allowing cable operators to engage in predatory pricing at any time or any circumstances."[53] But it does not undercut the basic statutory language limiting the FCC's role to disputes where effective competition is not present.

CONCLUSION

For the foregoing reasons, the Commission should deny the Petitions for Reconsideration.

Respectfully submitted,



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[53] WCA Petition at 11 (quoting 142 Cong. Rec. 5720 (daily ed. Feb. 1, 1996) (statement of Sen. Gorton.))

CERTIFICATE OF SERVICE

I, Staci M. Pittman, hereby certify that copies of the **Opposition of the National Cable Televison Association** were served via first class mail, postage prepaid, this 2nd day of September, 1999, upon the following:

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